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No. 80-1085

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

UNION CARBIDE AGRICULTURAL PRODUCTS CO. INC., *et al., Petitioners,*

v.

WALTER C. BARBER, JR., ACTING ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, *et al., Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## REPLY BRIEF OF PETITIONERS

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The statement pursuant to Rule 28.1, included in the Petition for Certiorari herein, filed January 2, 1981, remains currently accurate.

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## ARGUMENT

### I. Respondents Misstate The Question Presented To This Court

The matter before this Court is the proper standard for the issuance of preliminary injunctions. The issue is whether those who seek preliminary injunctions must demonstrate that they will probably succeed on the merits, as held by the Second Circuit below, or whether a movant's chances of success on the merits should count as a single factor to be weighed together with the irreparability of harm and with other considerations, as established in decisions of other circuits and of this Court.

This subject is important to the administration of the federal judiciary, and needs authoritative clarification by this Court.

In stating the Question Presented, however, respondents attempt to bypass this question by focusing upon a single collateral subissue, concerning the Tucker Act. They frame the question in terms of whether the preliminary injunction was properly reversed where, as to that Tucker Act issue, petitioners "had failed to demonstrate *any* likelihood of success" (Brief in Opposition, 1, emphasis added).

This formulation diverts the Court from the significant issues tendered by the decision below and trivializes them. These issues do not concern the Tucker Act, but concern the standard for issuance of preliminary injunctive relief, especially the matter of how the requisite quantum of prospective success on the merits should be determined in given circumstances.

Moreover, respondents' formulation of the Question Presented is highly inaccurate and misleading. Neither court below found that petitioners had failed to demonstrate any possiblity of success on the Tucker Act issue, or, for that matter, on any of petitioners' other contentions, which

respondents have chosen entirely to ignore. The district court found that "in addition to substantial irreparable injury there are obviously serious questions going to the merits to make them a fair ground for litigation with the balance of hardship tipping decidedly toward plaintiffs" (Petition for Certiorari, Appendix, 16a); from context, the Tucker Act question is plainly among the "serious questions going to the merits". The court of appeals held only that the district court should have required petitioners to demonstrate a mathematical probability of success on the merits, and it did not find this high degree of success shown upon the preliminary injunction record. *See* Petition for Certiorari, Appendix, 9a.

Thus, it is unfair to suggest that either court below found plaintiffs to have made a showing on the Tucker Act issue, or on any other issue, which was any less strong than a showing that just missed meeting the Second Circuit's stringent standard.[1]

It is noteworthy that respondents assail petitioners' showings of prospective success on the merits only as to the single issue concerning the Tucker Act. Petitioners had advanced substantial showings on the merits of the entire case, including their principal contentions concerning the threatened taking and disclosure of their previously-submitted trade secret data, retroactively and without just compensation, in violation of fifth amendment protections and of statutory assurances that the data would be held in confidence. Respondents do not mention petitioners' showings on these issues.[2]

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[1] Respondents' misleading formulation of the Question Presented is paralleled by an assertion in the body of their argument that "*as both courts below assumed*, the Tucker Act applies to the types of constitutional claims asserted by petitioners and there is *only a negligible showing* of withdrawal of that remedy" (Brief in Opposition, 11, emphasis added). Again, for the same reasons, the statement is groundless and unfairly stated.

[2] Petitioners made substantial showings on the Tucker Act issue. The language and history of the FIFRA data compensation provision make it clear that this complex system was intended by

## II. Respondents' Brief Ignores Entirely The Important Constitutional Issues Raised By The Second Question Presented In The Petition For Certiorari

In their second Question Presented, petitioners urge that the Second Circuit's test for grant of preliminary injunctions, as applied in cases like the present, is unconstitutional. Without interim injunctive protection, the trade secret research data will be disclosed to the public, thus destroying before trial the subject matter of petitioners' constitutional claims. The Second Circuit's test — which demands a showing of "likelihood of success" that is practically impossible to fulfill in complex taking cases — contravenes the just compensation and due process clauses, by denying claimants a reasonable opportunity to get the interim

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Congress to be the exclusive remedy of data owners for the government's use and disclosure of their data. Prior to 1978, FIFRA gave data owners access to the federal courts to obtain "just compensation" from the user under section 3(c)(1)(D) if EPA's compensation award was deficient. 118 Cong. Rec. 33922 (1972). But in the 1978 FIFRA amendments, Congress withdrew all federal court jurisdiction and remedies, limiting data owners to a nonappealable arbitration procedure. The amended statute provides that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination" except for fraud, misrepresentation and the like. FIFRA §3(c)(1)(D)(ii), 7 U.S.C. §136a(c)(1)(D)(ii) (Supp. III 1979). In the 1972 FIFRA, compensation was available for all data submitted by petitioners. Congress subsequently cut off all compensation for data submitted before 1970. *See* FIFRA §3(c)(1)(D)(ii). The withdrawal of previously existing compensation rights for pre-1970 data, and the withdrawal of access to all federal courts to obtain any shortfall from "just compensation," show Congress' intent to make the FIFRA compensation scheme the sole available remedy for data owners, and to preclude any further compensation remedy through the Tucker Act. Even if available, the multiplicity of Tucker Act suits that a data owner would be required to pursue to obtain just compensation each time the EPA disclosed or used tens of thousands of items of trade secret data would be unfairly onerous, raise insuperable problems of valuation, and would be intrinsically inadequate to compensate for the unjust enrichment of petitioners' competitors as a result of the disclosure of the trade secrets.

injunctive relief that is necessary to preserve their remedies under those clauses. *See* Petition for Certiorari, 21-27.

The respondents' brief in opposition entirely ignores this significant aspect of the case.

### III. Respondents' Brief Itself Shows That The Second Circuit's Test For Preliminary Injunctive Relief Is Not Reconcilable With The General Rule Of The Circuits

The district court found serious questions on the merits, but the Second Circuit held that the plaintiffs' showing on those questions did not rise to the level of demonstrating that they probably would succeed. Solely for this reason, the court of appeals reversed the preliminary injunction. Under the Second Circuit's uncompromising standard, the gravity and irreparability of harm to plaintiffs and the weight of other equitable considerations are totally disregarded, unless plaintiffs show greater-than-even chances that they will succeed on the merits.

This approach contrasts sharply with the role that appraisal of the chances of success is given by other circuits and by this Court. There, the chance of success is one of several factors to be weighed and balanced (Petition for Certiorari, 12-21; Supplement to Petition Calling Attention to New Matter, 1-4 and Appendix).

Remarkably, the respondents nowhere directly assert that the Second Circuit applied the general rule or any other stated standard which they claim to be proper. The most they claim is that relevant authorities "support" a proposition which respondents inaccurately say explains the intent of the court of appeals (Brief in Opposition, 9-10), and that the court's reversal of the district court was "consistent with settled principles governing issuance of preliminary injunctions" (Brief in Opposition, 15).

Indeed, a major portion of the respondents' argument is that "even assuming that the court of appeals was wrong in holding that petitioners were required to show a likelihood of

success on the merits of their claims, the judgment of the court was still proper" (Brief in Opposition, 10), because the court reached a justifiable result. (The propriety of asking this Court to consider the post hoc justifiability of the result is discussed at pages 8-9 below.)

Respondents, for practical purposes, implicitly acknowledge that the Second Circuit applied an erroneous standard.

They recognize that the "general rule" (to which they cite no exceptions) "is that the decision whether to grant the extraordinary remedy of a preliminary injunction turns on a 'flexible interplay of the four factors to be considered.' * * * The strength of the showing required in a particular case as to any given factor depends on the showing made with respect to the other factors" (Brief in Opposition, 13). Under this approach, "the probabilty that plaintiffs will succeed on the merits" (Brief in Opposition, 13) is neutral in a quantitative sense. That is, it measures the plaintiff's chances of success as a *relative* matter; it does not impose an *absolute* requirement to show better-than-even chances of success. The quantum of prospective success that must be shown in any case will vary with the balance of the other equitable factors, and may be less than a preponderance. *See* Petition for Certiorari, 12-18; Supplement to Petition Calling Attention to New Matter, 2.

The Second Circuit did not apply the general rule, and its holding can derive no support from it. The Second Circuit established an inflexible, mechanistic test, requiring petitioners "to show both a likelihood of success on the merits and a threat of irreparable harm" (Brief in Opposition, 8). It ruled out any finely graded balancing of equitable considerations, or "flexible interplay of the four factors to be considered." It would not permit any flexibility in its rigid likelihood-of-success test so as to make it "depend on the showing made with respect to the other factors." The test is as mechanical as a slot machine: no likelihood of sucess, no interim relief.

It is thus disingenuous to claim that the authorities, which express the flexible general rule, "support the court of appeals' decision in this case" (Brief in Opposition, 13).

Respondents attempt to justify the action of the Second Circuit as being "consistent with" the relevant authorities on the ground that the injunction allegedly would "delay effectuation of the public interest as expressed by Congress in a statute" (Brief in Opposition, 9). In these circumstances, they argue, "a stronger showing must be made with respect to possible success on the merits than is the case where no such threat to the public interest is posed" (Brief in Opposition, 9-10), and "the court of appeals properly required a reasonably strong showing of the possibility of success on the merits" (Brief in Opposition, 15).

It should be carefully noted that respondents do not go so far as to state that the "stronger showing" must or may be a mathematical probability of success, as demanded by the Second Circuit's test.[3] They seem to suggest, however, that the mere presence of a statute which is sought to be enjoined justifies the requirement that plaintiffs show a probability of succeeding on the merits, irrespective of the degree of harm to the plaintiffs, the actual injury which the specific injunction might cause to the public interest or to the defendants, or any other relevant considerations which should be weighed and balanced.

Perhaps, where a statute would be enjoined, a "stronger" or "reasonably strong" showing should be required, *if found warranted by the circumstances of the*

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[3] Thus it is fallacious to state that the court of appeals was saying "nothing more than that" a "stronger showing" is called for where a statute would be enjoined (Brief in Opposition, 9-10). The court *did* say more: it employed an absolute standard requiring a preponderant probability of success, rather than some relatively-determined "stronger" or "reasonably strong" showing of the possibility of success. *Nowhere do the respondents claim that the Second Circuit's standard is correct.*

*given case.* But the determination of what standard of success is demanded in the particular case should be made through the weighing and balancing process, taking into account all of the relevant circumstances *of that case.*[4] Respondents themselves so state: "The strength of the showing required *in a particular case* as to any given factor depends on *the showing made* with respect to the other factors" (Brief in Opposition, 13, emphasis added).

That was not the approach taken by the court below. It did not examine either the specific statute or specific public interest values implicated in this case, to see whether, weighed together with the other factors, they required a relatively strong showing of prospective success on the merits. The court made no effort to examine the specific circumstances of this case at all. Its inquiry went no further than to observe that a statute was being enjoined.

Without inspecting the circumstances of the particular case, a court cannot assume that enjoining a statute will necessarily injure the public interest, let alone do so to a degree that sweeps to the side all otherwise relevant equitable considerations bearing upon grant of an injunction. This is well illustrated in the present case, where the injunction restrains only a small fraction of the range of operation of the 1978 amendments in question, and does not in fact thwart Congress' public interest objectives. Congress intended the 1978 FIFRA amendments to improve the competitive position

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[4] In *Yakus* v. *United States*, 321 U.S. 414 (1944), relied on by respondents, *the statute itself* dictated the nonavailability of preliminary injunctive relief, as needed in the public interest to protect an emergency program. In its discussion of equity practice regarding interlocutory injunctions, the Court stressed judicial discretion and consideration of the circumstances of the particular case. 321 U.S. at 437-42. It held that "we are unable to say that the denial of interlocutory relief pending a judicial determination of the validity of the regulation would, in the special circumstances of this case, involve a denial of constitutional rights." *Id.* at 439. Congress "has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest." *Id.* at 441.

of small pecticide producers known as formulators by removing, for them, entry barriers posed by costly research requirements.[5] The preliminary injunction, drafted with EPA's concurrence as to form, perpetuated Congress' exemption of formulators, permitting these businesses to continue to obtain pesticide registrations and compete regardless of the injunction against EPA's use of data. (*See* Preliminary Injunction, ¶ (2)(b), Appendix C to Petition for Certiorari). These more than 4,000 formulators constitute 98-99% of all pesticide registrants. Congress also intended to make pesiticide data available for review in the public interest, but not by competitors, particularly "foreign and multinational pesticide producers." *See* FIFRA §10(d) and (g), 7 U.S.C. §136h(d) and (g) (Supp. III 1979). Before the preliminary injunction was granted, petitioners represented to the district court that, notwithstanding an injunction, they would make pesticide data available for review to public interest scientists and representatives, and they have in fact done so. The preliminary injunction therefore only prevents access to trade secret information by competitors, but does not in fact impair the intended public interest.

### IV. The Respondents' Claim, That The Second Circuit's Result Can Be Justified On Grounds Other Than The Propriety Of Its Holding, Is Inappropriate And Unsuccessful

Respondents advance a further remarkable argument: "But even assuming that the court of appeals was wrong in holding that the petitioners were required to show a likelihood of success on the merits of their claims, the judgment of the court was still proper" (Brief in Opposition, 10). The judgment was "proper", respondents argue, because

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[5] Report of House Committee on Agriculture, H.R. Rep. No. 95-633, 95th Cong., 1st Sess. 18-19 (1977). Formulators are persons "who buy registered basic pest control chemicals from another producer to formulate his purchased pesticide into an end-use product . . . ." *Id.* at 19.

of petitioners' "inability, in the estimation of both courts below, to make a substantial showing that relief under the Tucker Act would be unavailable to them for any constitutional injuries they might ultimately prove" (*ibid.*). In other words, the result can be justified, after the fact, on the basis of this single subordinate issue.

Petitioners have been at some pains above (pages 1-2) to show how inaccurate and misleading it is to suggest (as by the words "in the estimation of both courts below" in the passage just quoted) that plaintiffs had made no showing or only a negligible showing on the merits of the Tucker Act issue. In fact, a substantial showing was made. In any event, withdrawal of the Tucker Act, which is only one of several complex subjects implicated in the merits of this case, can be addressed only after resolution of the primary issue of the proper standards for issuance of preliminary injunctions.

Respondents would have this Court pass upon the rights and wrongs of the district court's basis for concluding that Congress might have withdrawn the Tucker Act remedy (Brief in Opposition, 11). They are inviting the Court to consider in detail (although without benefit of the record) the degree of prospective success that petitioners showed or might have shown with respect to a single issue. That point is but one subordinate element in the cluster of substantive issues evaluated by the district court in its consideration of the several factors bearing upon whether a preliminary injunction should be granted. It would be especially inappropriate for this Court to be placed in the position of a district court to examine an issue (the prospective merits of a Tucker Act defense) different from the issue presented by the decision under review (the proper standard for grant of preliminary injunctive relief).

Though this Court has from time to time passed upon the appropriateness of preliminary injunctive relief,[6] it has

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[6] *Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1929); *Brown* v. *Chote*, 411 U.S. 452 (1973). *See also Yakus* v. *United States*, 321 U.S. 414, 439-42 (1944).

not addressed the subject in an extensive or comprehensive manner. The question of the showing that must be made for preliminary relief is one that holds great consequence for the day-to-day exercise by the federal courts of one of their most formidable and delicate powers. The legal issues and practical affairs at stake in preliminary injunction proceedings are characteristically substantial, complex and numerous. Sound judicial administration calls for decisional standards that assure supple and finely focused consideration of all pertinent factors. In contrast to the Second Circuit's per se rule, which disregards all other considerations if it is not fulfilled, a flexible and refined jurisprudence is at hand in the four-factor approach cited by the government and advocated by petitioners. In view of this striking conflict of the circuits, the present case supplies a fitting occasion for the Court to consider whether such an approach should be announced for guidance of the entire federal judiciary.

Respectfully submitted,

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